IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 14, 2006 Session

KYONG EUN KIM v. JAMES ORDELL LAUMB, JR.

Appeal from the Chancery Court for Montgomery County
No. 2001-06-0072 Michael R. Jones, Judge

No. M2005-01736-COA-R3-CV - Filed on October 6, 2006

Appellant/Mother challenges the trial court's denial of her Motion to Modify Parenting Plan. Applying the appropriate presumption of correctness under Tennessee Rule of Appellate Procedure 13(d), we hold that the evidence does not preponderate against the factual findings of the trial court. We likewise affirm the trial court's refusal to hold Appellant in contempt for failing to comply with the Chancery Court's divorce decree and incorporated parenting plan.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J. and JON KERRY BLACKWOOD, SR.J., joined.

Sharon T. Massey, Clarksville, Tennessee, for the appellant, Kyong Eun Kim.

Christopher J. Pittman, B. Nathan Hunt, Clarksville, Tennessee, for the appellee, James Ordell Laumb, Jr.

OPINION

I.

Kyong Eun Kim and James Ordell Laumb, Jr. were divorced in Montgomery County Chancery Court in December of 2002. At the time of the divorce, Ms. Kim was a full-time student in Austin Peay University's nursing program. At all times pertinent to this appeal, Mr. Laumb has worked as a self-employed construction subcontractor. The parenting plan incorporated in the divorce decree provided that each parent retained a right of first refusal when the other parent was unable to exercise custodial privileges. The Chancellor noted in her ruling at the divorce hearing that the heart of Ms. Kim's original Complaint for Divorce was that Mr. Laumb was spending less time at home and more time away from the children and that his behavior toward her had become increasingly cruel. Chancellor Catalano made the following statements from the bench characterizing this cruel treatment.

> Therefore, on an occasion when the parties were seeing each other at the marital residence, they had an altercation. Now, Mrs. Laumb describes it as Mr. Laumb dragging her to the bedroon, causing her to be bruised because she was resisting him. Mr. Laumb described the situation as Mrs. Laumb came over to the house to get a few things, and he thought he knew what she was supposed to get but she was getting other things. And when he objected to that, that she grabbed a picture of them when they got married and broke it. But, therefore, he grabbed her in a "bear hug" and walked her outside, and he called the police because she bruises easily. And there's an exhibit here of some bruising, slight, slight bruising, to one of her arms.
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> Mrs. Laumb told us that before that incident at the marital residence, the parties had agreed that the children would be with Mrs. Laumb, even though she was living only in a two-bedroom apartment in a different school district from where the children lived. And Mr. Laumb said that under that agreement he had the children for about a week under those terms whenever he wanted them. But after that incident at the marital residence, even though he might ask Mrs. Laumb for days in advance, he would be told he could not have the children, not for the 4th of July, not to take then to Minnesota, not for whatever else it was that he thought he should have them.
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> It doesn't make a really strong case here for divorce to be granted, that Mr. Laumb was gone all the time for the first six or seven years of the parties' marriage. But when you add to it Mrs. Laumb's total responsibility for the household and the children and the marriage and then Mr. Laumb making attempts to change under counselling, but then sliding back to some old habits, which no doubt might have been very difficult to make, it doesn't make the strongest case for divorce on the grounds of inappropriate marital conduct. But that's all there is. Both parties have alleged that the other party is guilty of inappropriate marital conduct, and I would say that Mr. Laumb's failure to take his responsibilities to be a father to the parties' three minor children and perhaps more supportive of Mrs. Laumb when there were problems between her and his family, that Mrs. Laumb should be granted the divorce on the ground of Mr. Laumb's inappropriate marital conduct.

It is upon this ground that a Decree was entered December 16, 2002, granting Ms. Kim a divorce and incorporating a parenting plan created from an amalgam of the separate plans submitted by the parties. Pursuant to the parenting plan, the parties were given joint custody with Mr. Laumb designated as primary custodian. Also pursuant to the parenting plan, the father had custody of the children during the school year on week days, with Mother awarded weekends "from 4 o'clock p.m. (or when school lets out) [Friday] until 8 o'clock the following Monday (when school commences)". Sixteen (16) months later, Ms. Kim obtained nursing certification and employment at Gateway Hospital. Two (2) months after that, on June 19, 2004, V.L., the oldest of the three children, was involved in a car accident. At the time of the accident she was riding with the 17-year-old son of Mr. Laumb's live-in girlfriend and traveling back from a vacation road trip to Kentucky Kingdom. The

17-year-old was driving Mr. Laumb's truck. The accident necessitated several surgeries and a hospital stay for V.L.

On August 6, 2004, Ms. Kim filed her Motion to Modify Parenting Plan, for an Expedited Hearing and for Temporary Restraining Order before the Chancery Court. This Motion alleged the following changes in the circumstances considered under the original parenting plan which warranted modification:

1. Ms. Kim's full-time employment, primarily on the weekends and that said employment interferes with the current custodial arrangement in the parenting plan;
2. The accident involving the oldest child in the summer of 2004;
3. The declining grades of all three children;
4. The allegation that Mr. Laumb had allowed children's medical insurance to lapse;
5. Disciplinary habits of the father and increasing displeasure of the children with the current custodial arrangement.

Mr. Laumb filed a Response to the Motion to Modify Parenting Plan and Counter Petition for Contempt and to Modify the Parenting Plan. He denied Ms. Kim's allegations implying any negligence on his part in the car accident involving his daughter, admitted that Ms. Kim took the child to her medical appointments, specifically averred that the prior Divorce Decree required Ms. Kim to maintain health insurance and alleged that she had allowed the insurance to lapse, and, most significantly for this appeal, averred that Ms. Kim refused to comply with the right of first refusal provision in the parenting plan. Mr. Laumb also sought modification of child support based upon Ms. Kim's increased income as a nurse at Gateway Hospital.

In its Judgment filed May 5, 2005, the trial court, Circuit Judge Michael Jones sitting by interchange, found that Ms. Kim "has failed to establish that there has been any change of circumstances and particularly any change of circumstances not reasonably foreseen at the time of the Final Decree." Based on the proof presented at trial, the trial court found Ms. Kim's testimony incredible as to the allegation of a changed work schedule. The trial court noted that the testimony before the court revealed that this mother left her children unsupervised during her two to three 12-hour shifts over the weekends she was to exercise custodial privileges. The trial court specifically stated, "Based on the mother's leaving the children over night without supervision and without taking the children to their father's house during that time, the court is changing the mother's parenting time to require that any time she is required to work, she must take the children to the father's house and leave them until she has completed her work and completed any sleep that she needs." The court found that the alleged declining grades were not borne out by the testimony, and that, in fact, testimony favored the father's claim that Ms. Kim was in willful disregard of the parenting plan provisions. Nevertheless, the court refused to sanction her for contempt. Ms. Kim appeals the trial court's refusal to modify the parenting plan, and Mr. Laumb appeals the trial court's refusal to find the mother in contempt for failing to comply with the parenting plan.

The trial court heard the proof on this Motion on May 5, 2005. In addition to Ms. Kim's own testimony, she presented the oldest child's eighth grade teacher, the middle child's fifth grade teacher and the youngest child's third grade teacher. All teachers testified that despite fluctuation in grades, the children were adjusting well and were improving at the time of the hearing. A family friend, Lisa Taylor, whose children were attending school with two of the minor children, and the next-door-neighbor who occasionally watched the children during Ms. Kim's work shift also presented testimony. For his part, Mr. Laumb testified as to his communications problems with the mother and her refusal to cooperate regarding the custody exchange between the parties. The children themselves did not testify.

II.

When a parent moves to modify an existing parenting plan, he or she first bears the burden of showing by a preponderance of evidence that a material change of circumstance has occurred after the original decree, which was not foreseen or foreseeable at the time of the divorce decree. *See Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn.2002); Tenn.Code Ann § 36-6-101(a)(2)(B); *see also Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn.2002). The trial court's findings of fact in this regard are accorded a presumption of correctness absent a showing that the evidence at trial preponderates against them. Tenn.R.App.P. 13(d); *Kendrick*, 90 S.W.3d at 570. The trial court's conclusions of law do not benefit from the presumption and are subject to a pure *de novo* review. Tenn.R.App.P 13(d); *Kendrick*, 90 S.W.3d at 570. In the absence of specific factual findings, this Court reviews the record afresh to determine where the preponderance of evidence lies. *Kendrick*, 90 S.W.3d at 570, *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997). The material change of circumstance inquiry addresses itself to the trial court's discretion as the exigencies of each particular dispute may indicate:

> While "[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have formed a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is not one that was known or reasonably anticipated when the order was entered," and the change "is one that affects the child's well-being in a meaningful way." *Id.* (citations omitted). We note that a parent's change in circumstances may be a material change in circumstances for the purposes of modifying custody if such a change affects the child's well-being.

Kendrick, 90 S.W.3d at 570.

The proof at trial failed to show the change of circumstance other than those that normally happen from time to time in the lives of children and parents. These do not necessarily affect the welfare of a child in a material way requiring the modification of the parenting plan. The testimony proffered at trial from the children's teachers showed that despite one incident of in-school suspension (ISS) and some intervening grade fluctuation, all three children were advancing at appropriate speed, and that grades, while dipping some times dramatically during the course of this

couple's continued inability to communicate and cooperate concerning custody matters, were now improving. Other than providing a glimpse as to how the children behaved while under Ms. Kim's care, neither of Ms. Kim's remaining witnesses provided any evidence concerning any change of circumstances. Contrary to the argument of the appellant, we conclude that the three-page opinion from the trial court, while including a very detailed statement of the law applicable to modification cases, did indeed contain the requisite factual finding. Ms. Kim gave the only testimony at trial concerning the necessity of choosing a consistent weekend work schedule with a pay differential over a varied schedule including weekend work. The trial court heard the witnesses in a matter which rests in large part on the credibility of testimony. Credibility determinations made by the trial court are accorded great deference on appeal. *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn.Ct.App.1998). Our review of the record does not reveal evidence preponderating against Judge Jones's finding that in fact no change had occurred since the original Decree which was not foreseen at that time.

III.

The decision whether to sanction a party for contempt necessarily rests with the discretion of the trial judge. *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn.1993). The purpose of criminal contempt sanctions is to vindicate the authority of the court.

> Punishment for contempt should fit the offense, and the court against whom the contempt is committed is in the best position to fashion the appropriate punishment consistent with the applicable legal principles. *Walker v. Walker*, No. M2002-02786-COA-R3-CV, 2005 WL 229847, at *3 (Tenn.Ct.App. Jan. 28, 2005 (No Tenn.R.App.P. 11 application filed). Accordingly, courts have inherent authority to order punishment for acts of contempt, *Reed v. Hamilton*, 39 S.W.3d at 117-18, and their exercise of this power is discretionary. *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn.1993); *Hill v. Hill*, 152 S.W.3d 543, 548-49 (Tenn.Ct.App.2004); *Freeman v. Freeman*, 147 S.W.3d 234, 242 (Tenn.Ct.App.2003).

McPherson v. McPherson, No. M2003-02677-COA-R3-CV, 2005 WL 3479630, at *4 (Tenn.Ct.App. Dec. 9, 2005).

The testimony presented by both parties showed an unwillingness primarily on Ms. Kim's part to communicate with Mr. Laumb and to cooperate in "trading" custody days or effecting any voluntary change in the parenting plan. There is no question that the communication swords wielded by both parties are double edged. Despite provisions in the plan requiring the mother to offer the father custody of the children when her work schedule prevented her from supervising the children overnight, Ms. Kim refused to contact Mr. Laumb. The trial court's ruling on Ms. Kim's Motion to Modify the plan requires her to leave the children in the care of Mr. Laumb during her work shifts and sleep time. Making such arrangements will require appropriate communications between the parties. While the contempt power of the court is an appropriate enforcement tool, we find no abuse of discretion in the trial court's determination that contempt sanctions would serve no purpose at this time. We therefore affirm the trial court's order in its entirety. Costs on appeal are taxed against the appellant.

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WILLIAM B. CAIN, JUDGE